United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

with affidavit

75-7087

To be argued by
PETER C. SALERNO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7087

SCHUYLER MARKET, INC. and
NATALE DE MARTINO,
Plaintiffs-Appellants,

—v.—

EARL BUTZ, as Secretary of Agriculture
of the United States,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

Statement of the Case

Appellants Schuyler Market, Inc. and Natale De Martino appeal from an order of the Honorable Charles M. Metzner of the United States District Court for the Southern District of New York, filed December 27, 1974, dismissing their complaint after a trial before the Court without a jury. Judge Metzner's decision appears at pages 9 and 10 of the Appendix on this appeal.

Plaintiffs-appellants brought this action in the district court, pursuant to 7 U.S.C. § 2022, to overturn a determination by the Department of Agriculture disqualifying them from participation in the food stamp program for one year. Schuyler Market, Inc. is a supermarket at

Columbus Avenue and 93rd Street in Manhattan, and Natale De Martino is its president and sole stockholder (Tr. 9-10).*

The disqualification of appellants from participating in the food stamp program was based upon an administrative finding, after an investigation, that Schuyler Market, Inc. and Mr. De Martino were guilty of flagrant violations of food stamp program regulations, 7 C.F.R. §§ 270.2(s) and 272.2(b), namely the sale of ineligible items and the purchasing of food stamps for cash. (See Plaintiffs' Exhibit 8, 22a).**

Pursuant to 7 U.S.C. § 2022, this order was subject to de novo review by the Court to determine its validity. A trial was held before Judge Metzner on December 11 and 12, 1974, at which the Department of Agriculture presented evidence that the violations charged to appellants had occurred. Judge Metzner found, in an opinion and order filed on December 27, 1974, "that the plaintiffs have failed to prove by a fair preponderance of the evidence that the order (Pls. Ex. 8) attacked is invalid." (10a)

Schuyler Market and De Martino filed a notice of appeal on January 24, 1975. In a memorandum endorsed order filed February 11, 1975, Judge Metzner stayed the order of disqualification pending the determination of this appeal.

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* "Tr." refers to pages of the transcript of the trial in this action. This transcript is reproduced in the appellants' appendix, following page 10, but is not separately renumbered. Page 11 of the appendix follows page 172 of the transcript.

** References followed by "a" are to pages of the appendix apart from the transcript of the trial. See previous footnote.

Issues Presented

1. Was the District Court correct in striking appellants' demand for a jury trial?

2. Did the District Court correctly place the burden on the appellants to prove the invalidity o. the disqualification order?

3. Did the District Court properly find for the defendant on the evidence?

Statement of Facts

The Food Stamp Program

The essence of the food stamp program, 7 U.S.C. §§ 2011 *et seq.*, is that

> "eligible households within the State shall be provided with an opportunity to obtain a nutritionally adequate diet through the issuance to them of a coupon allotment which shall have a greater monetary value than the charge to be paid for such allotment by eligible households. *The coupons so received by such households shall be used only to purchase food from retail food stores which have been approved for participation in the food stamp program.*"

7 U.S.C. § 2013(a) (emphasis added).

The statute authorizes the Secretary of Agriculture to promulgate regulations, 7 U.S.C. § 2013(c), and a food store may be disqualified from participating in the program upon a finding that it has violated either the statute or the regulations. 7 U.S.C. § 2020. The violations involved in the case at bar, if committed knowingly, are also crimes.

7 U.S.C. § 2023(b), (c). A finding of disqualification may be reviewed in court pursuant to 7 U.S.C. § 2022.

The plain language of the statute as quoted above would indicate that it is violated if a retail store accepts food stamps for anything other than food, *i.e.* non-food merchandise or cash. The regulations similarly provide that "[c]oupons shall be accepted . . . only in exchange for eligible food as defined in § 270.2(s) of this subchapter." 7 C.F.R. § 272.2(b).

The Instant Case

Joseph J. Gregas, the Agriculture Department's officer in charge of the food stamp program in the Manhattan area (Tr. 27), testified as to the general aspects of the program and the events leading to the investigation of Schuyler Market for violation of the regulations. He stated that before a store is authorized to accept food stamps, it receives instruction in the regulations, and routine follow-up visits are made as the regulations change (Tr. 29). Mr. De Martino admitted receiving such visits (Tr. 21).

Suspicion arose in 1972 that Schuyler Market might be violating the regulations (Tr. 31), when food stamp redemption figures showed it to be redeeming excessively high numbers of stamps in comparison to other stores in its area (Tr. 30-32). A Department of Agriculture representative visited the store on May 31, 1972, reviewed the regulations with Mr. De Martino, and warned him of the consequences of violating them (Tr. 31; Defendant's Exhibit A (31a)). Monitoring of the store from May to December 1972 revealed no change in the situation, and the case was referred for investigation (Tr. 32).

Violations of the food stamp regulations are investigated by sending "investigative aides" into a suspected store to attempt to purchase ineligible items with food

stamps and to exchange stamps for cash (Tr. 116-18). A total of six such shopping visits were made to Schuyler Market, on May 23, 24, 29, 30, June 4 and June 6, 1973 (Tr. 72, 117) by two investigative aides, Nydia Cabassa and Ruth Oliveras. Their testimony at trial was corroborated by that of Agent Jeffrey Schaffler, one of two agents participating in the investigation,* who waited outside the store while the aides shopped (Tr. 118), and by contemporaneous written statements of the aides and the agents made immediately after they shopped (Defendant's Exhibits D through R (35a-64a)).

The procedure on a shopping visit was for the aide to surrender her handbag, personal cash and any personal food stamps to the agent remaining outside the store, so that she would enter the store only with food stamps given to her by the agent (Tr. 36, 45, 55, 58, 73, 77, 80, 102, 104, 117). Each aide testified that when she shopped at Schuyler Market, she had no cash or food stamps on her person other than the food stamps the agent had given her (Tr. 36, 45, 77, 104).

The aides then entered the store and attempted to purchase ineligible items with the stamps given them by the agent (Tr. 35-36, 73-74, 77, 118). When they returned to the automobile in which the agent was waiting they, together with the agent, wrote down everything that had been purchased, as well as what was left over as food stamps, credit slips, or cash (Tr. 58-59, 60, 74, 77, 80, 119-20; Defendants Exhibits D through R (35a-64a)).

Aide Nydia Cabassa visited Schuyler Market on three occasions, May 23, 24 and 30, 1973 (Tr. 38). While she could not recall details of how many food stamps she was

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* The other agent, David Ricks, was no longer employed by the Department of Agriculture at the time of the trial and was not available to testify (Tr. 126).

given or what ineligible items she purchased, she identified defendant's exhibits D, E, and F as statements made by her immediately after each shopping visit. She stated that she read each statement and that it was true when she signed it (Tr. 39, 42-46), and the statements were thus admitted into evidence (Tr. 41) as records of past recollection.

Ms. Cabassa's statements (35a-43a) show each ineligible item that she purchased from Schuyler Market. They are corroborated by the food stamp transaction worksheets prepared by Agents Schaffler and Ricks (Defendant's exhibits M, N, and P) showing the amount of food stamps he gave Ms. Cabassa and his own itemization of the goods with which she returned from the store.*

Aide Ruth Oliveras visited Schuyler Market on all occasions (Tr. 72). On May 23, 24, and 29, she purchased ineligible items at the store (Tr. 73-82; Defendant's exhibits G, H, and I (44a-52a)). As in the case of Ms. Cabassa, she made contemporaneous statements (Defendant's exhibits G, H, and I) recording exactly how many food stamps she had been given by the agent and what she had purchased with them, and the Agent's food stamp transaction worksheets corroborated this information (Defendant's exhibits M, N, and O (56a, 58a, and 60a)).** Ms. Oliveras read each of her statements before she signed it, and each was true when she signed it (Tr. 74, 77-78, 81).

On May 30, 1973, accompanied by Ms. Cabassa, Ms. Oliveras also visited Schuyler Market, and this time she sold food stamps for cash. She approached a man who

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* The reverse sides of these worksheets, showing the items purchased, were inadvertently not reproduced in the appendix. The portions showing the stamps given to Ms. Cabassa are at 57a, 59a, and 62a.

** See previous footnote.

worked at the vegetable stand, who had told her that his name was "Joe," and asked if he knew anybody who would like to buy food stamps. Joe said he would sell them for her, took the stamps to another man in the store, and returned, paying her $15 for $30 worth of stamps (Tr. 84). Ms. Cabassa witnessed these events (Tr. 47-48).

Ms. Oliveras next went to Schuyler Market on June 4, 1973 (Tr. 84-85), at which time she sold $120 worth of food stamps for $60 (Tr. 86), to a man who appeared to be the manager (53a).* The man told her that any time she had more food stamps, he would be happy to buy them (Tr. 86), and two days later, on June 6, the same man bought $180 worth of food stamps from Ms. Oliveras for $90 (Tr. 90-91).

Ms. Oliveras's sales on May 30 and June 4 are corroborated by the recovery, by the Department of Agriculture, of some of the coupons sold (Defendant's exhibit C). Each of these coupons bears the imprint of a rubber stamp affixed by Schuyler Market before the coupons are deposited. Appellant De Martino testified that he deposited food coupons accepted at his store in a bank once a week (Tr. 19), and he identified defendant's exhibit B at the stamp he used on each food coupon before depositing it (*Id.*; at 33a is a facsimile of the stamp's imprint). He then identified the twenty-five food coupons, collectively marked defendant's exhibit C, as having his stamp on them (Tr.

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* Ms. Oliveras first testified that she sold these stamps to the same "Joe" to whom she had sold them on her previous visit (Tr. 86), but she later described the man as being 6 feet 2 inches tall, weighing about 300 pounds, with long black hair parted in the middle, which was not Joe's description, and the statement she made immediately after the event bears this out (53a, 55a). (Since this statement is clear that Ms. Oliveras only dealt with one man in selling stamps on that date, the discrepancy in the weight of the man (compare 53a and 55a) is apparently inadvertent.)

21). The serial numbers of those coupons, which were received in evidence (*Id.*), also appear on the food stamp transaction worksheets for May 30 and June 4, 1973, as the serial numbers of coupons given to Ruth Oliveras (61a, 63a). Specifically, all six $5 coupons given to Ms. Oliveras on May 30, and bearing serial no. E26975647A, were recovered in exhibit C (Tr. 123); 19 out of the 24 $5 coupons given her on June 4 were so recovered (Tr. 125) and all of those coupons bear the imprint of the rubber stamp used by Schuyler Market before it deposited the coupons.

Against this overwhelming evidence, the appellants offered, in the main, only denials by Mr. De Martino and one of his clerks that violations had ever taken place (Tr. 11-12, 24-25). Mr. De Martino also denied having, on the dates in question, employees fitting certain descriptions appearing on the investigative aides' statements (Tr. 155-56).

As a result of the investigation just described, the Department of Agriculture mailed a letter to Schuyler Market specifically outlining the violations charged (11a-13a). Schuyler was invited to reply, and did so, denying each of the allegations in the letter of charges (14a-15a). The Regional Director of the food stamp program, on July 11, 1974, determined that the violations had occurred, and that Schuyler Market be disqualified from accepting food coupons for one year (17a-18a). These determinations were adhered to on review by a food stamp review officer on September 18, 1974 (22a-24a). That review became the final decision of the agency, and this action, pursuant to 7 U.S.C. § 2022, was commenced on September 27, 1974.

ARGUMENT

POINT I

The District Court properly struck appellants' jury demand.

Judge Metzner correctly ruled (Tr. 2) that appellants were not entitled to a jury trial in this case.* The statute, 7 U.S.C. § 2022, is replete with references to review by a *court*. It provides that an aggrieved party may file a complaint

> "requesting the *court* to set aside [the agency's] determination. . . The suit . . . shall be a trial de novo by the *court* in which the *court* shall determine the validity of the questioned administrative action in issue. If the *court* determines that such administrative action is invalid it shall enter such judgment or order as it determines is in accordance with the law and the evidence." (Emphasis added)

This means just what it says, that the trial is by a court, not a jury. *Saunders* v. *United States*, 507 F.2d 33, 36-37 (6th Cir. 1974). *See also J. L. Saunders, Inc.* v. *United States*, 52 F.R.D. 570, 571-72 (E.D. Va. 1971).

The authorities cited by the appellants, in their brief at pp. 10-11, are inapposite. The seventh amendment to the Constitution, which provides that "In Suits at common law, where the value in controversy shall exceed twenty

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* Judge Metzner also impliedly ruled that appellants had waived their right to a jury trial. The Judge stated that he "was advised there would be no jury trial when I had a pre-trial conference in this matter" (Tr. 2), and plaintiffs' counsel impliedly admitted that there had been such an understanding, but that he had changed his mind after researching the law (Tr. 3).

dollars, the right of trial by jury shall be preserved," does not apply to actions against the United States, because of the doctrine of sovereign immunity. Any right to a jury trial in such a case must be contained, either expressly or impliedly, in Congress's waiver of that immunity. *Galloway* v. *United States*, 319 U.S. 372, 388-89 (1943); *United States* v. *Sherwood*, 312 U.S. 584, 587 (1941); *McElrath* v. *United States*, 102 U.S. 426, 440 (1880). As has been shown, the statute in question on this appeal expressly provides for trial by the Court.

Forfeiture and penalty cases, to which appellant refers without citation of authority, are actions *by* the United States, and to the extent that they are actions at common law, the seventh amendment requires a jury trial. *E.g.*, *443 Cans of Frozen Egg Product* v. *United States*, 226 U.S. 172, 182-83 (1912); 5 Moore, Federal Practice ¶ 38.31[1]. The instant action is an action against an official of the United States to review an administrative determination, and in such an action there is no right to a jury trial. *See, e.g.*, *Cox* v. *United States*, 332 U.S. 442, 453 (1947); *Yakus* v. *United States*, 321 U.S. 414, 447 (1944).

Appellants' other authorities are equally irrelevant. *Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U.S. 27 (1916); *Leimer* v. *Woods*, 196 F.2d 828 (8th Cir. 1952); *Paley* v. *Greenberg*, 318 F. Supp. 1366 (S.D.N.Y. 1970); *Steffen* v. *Farmers Elevator Service Co.*, 109 F. Supp. 16 (N.D. Iowa 1952); and *United States* v. *Friedland*, 94 F. Supp. 721 (D. Conn. 1950), were all actions, in whole or in part, for money damages, and the respective courts held that they were common law actions for which a jury was required by the seventh amendment.

Judge Metzner was clearly correct in striking appellants' demand for a jury trial.

POINT II

The District Court properly placed the burden of proof on the plaintiffs.

Appellants contend that the district court erroneously refused to place the burden on the defendant of proving that Schuyler Market had violated food stamp regulations (Appellants' Brief at 12-13). Nothing in logic or in the applicable statute supports their position.

The statute, as has been noted, provides for "a trial de novo by the court in which the court shall determine the validity of the questioned administrative action in issue." 7 U.S.C. § 2022. Appellants can hardly deny that they received a trial de novo—the defendant produced witnesses, who were subject to cross-examination, and who testified that the violations had occurred. The evidence produced could have supported any burden placed upon the government.*

Judge Metzner properly ruled that appellants, as plaintiffs attacking the Agriculture Department's order, had the burden of proving that it was invalid (Tr. 8). This is precisely the holding of the Fifth Circuit's recent decision in *Redmond* v. *United States*, 507 F.2d 1007 (5th Cir. 1975). *See also J. L. Saunders, Inc.* v. *United States*, 52 F.R.D. 570, 572 (E.D. Va. 1971).

In *Redmond*, as in the instant case, an investigation was begun based upon abnormally high food stamp redemptions, 507 F.2d at 1008. The same procedure of send-

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* In *United States* v. *Lundy*, 505 F.2d 76 (5th Cir. 1974), the testimony of an investigative aide, refreshed by her contemporaneous memorandum, and corroborated by an agent's testimony that he gave the aide food stamps, was held sufficient to support a criminal conviction for accepting food stamps for cash, in violation of 7 U.S.C. § 2023(b).

a letter of charges, with subsequent administrative review, was in effect, *Id.* at 1009, and a one-year suspension was imposed. As to the question of the burden of proof in the trial de novo, the Court said:

> "By rejecting the substantial evidence standard of review in the Food Stamp Program and permitting a trial de novo, Congress intended nothing more than that the district court would not be bound by the administrative record. But by requiring the aggrieved store to file a complaint in the district court requesting that court to set aside the agency determination, the Act casts the burden of being the plaintiff on the aggrieved store with all of the usual responsibilities of a plaintiff in obtaining relief from a court, including the burden of proving facts to show that he is entitled to relief."

507 F.2d at 1011.

The only authority supposedly to the contrary cited by appellants does not support their position. In *United States* v. *First City National Bank,* 386 U.S. 361 (1967), an action to enjoin a bank merger, appellants correctly note (brief at p. 13) that the Supreme Court put the burden on the defendant banks of proving that the merger came within a statutory exception for mergers that benefited the community. The Court's reasoning, however, was that "[t]hat is the general rule where one claims the benefits of an exception to the prohibition of a statute," 386 U.S. at 366, and the Court noted explicit legislative history supporting the proposition in that case. *Id.* This reasoning does not apply to the instant case.

The authorities uniformly support the proposition that a disqualified food store has the burden of establishing the invalidity of the agency's sanction in an action under 7 U.S.C. § 2022. The district court did not err in allocating the burden of proof to the appellants.

POINT III

The evidence at the trial supported Judge Metzner's decision dismissing the complaint, and no errors were made in the admission of evidence.

Point III of the appellants' brief attempts to demonstrate that "the weight of the credible evidence favored Schuyler Market, Inc. and De Martino," and that for various reasons the government's witnesses should not have been believed (brief at 14-15, 19-24). These arguments, of course, are wholly misguided, since the weight of the evidence and the credibility of witnesses were for the district court to assess. It is sufficient to state that the evidence which we have set forth in the factual statement, if believed, demonstrated that violations of the food stamp program regulations had occurred at plaintiffs' store.

Appellants also attempt to argue at pp. 15-18 of their brief that the district court erred in admitting into evidence the statements made by the investigative aides immediately after each shopping visit; the food stamp transaction worksheets prepared by the agents; and a letter dated May 31, 1972 (31a), warning plaintiffs to take care to avoid violating regulations.

The aides' statements were clearly admissible as records of past recollection. *See generally* McCORMICK, EVIDENCE 712-16 (2d ed. 1972). This Court, in fact, has been particularly receptive to the doctrine of past recollection recorded. *United States* v. *Smalls*, 438 F.2d 711, 714 (2d Cir.), *cert. denied*, 403 U.S. 933 (1971); *United States* v. *Kelly*, 349 F.2d 720, 770-71 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966). The statements met the requirements for such documents:

> "(1) the witness must have had firsthand knowledge of the event, (2) the written statement must be an original memorandum made at or near the time of

> the event and while the witness had a clear and accurate memory of it, (3) the witness must lack a present recollection of the event, and (4) the witness must vouch for the accuracy of the written memorandum."

McCORMICK, EVIDENCE 712 (2d ed. 1972) (See Tr. 39, 42-46, 74, 77-78, 81).

The food stamp transaction worksheets were admissible, under 28 U.S.C. § 1732, as business records. Agent Schaffler testified that the worksheets were kept in the regular course of business of the Department of Agriculture, and that it was the regular course of business to keep such reports (Tr. 120). *See United States* v. *Friedland*, 444 F.2d 710, 712 (1st Cir. 1971); *Blanchard* v. *United States*, 360 F.2d 318, 320 (5th Cir. 1966); *La Porte* v. *United States*, 300 F.2d 878, 880-81 (9th Cir. 1962). They also show that he was personally present on each shopping visit when the worksheets were prepared (57a-60a, 62a-64a).

The appellants cite *United States* v. *Ware*, 247 F.2d 698 (7th Cir. 1957), in support of their claim that the worksheets should have been excluded. That case held it reversible error to permit a jury in a criminal case to see writings made by narcotics agents on envelopes, in which they detailed the circumstances of a narcotics transaction with the defendant.*

The reasoning of *Ware*, and of the cases cited in the footnote, is inapplicable to the case at bar. In the first place, the principal objection, noted by all three courts, appears to have been that "[t]he jury thus had before it a neat condensation of the government's whole case against

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* The holding of this case was followed in *United States* v. *Brown*, 451 F.2d 1231 (5th Cir. 1971), and by implication in *United States* v. *Adams*, 385 F.2d 548 (2d Cir. 1967).

the defendant." *United States* v. *Ware, supra,* 247 F.2d at 700; *United States* v. *Brown, supra,* 451 F.2d at 1234; *United States* v. *Adams, supra,* 385 F.2d at 550. This fear is inapplicable in a bench trial.

More to the point, these worksheets were part of the administrative record upon which plaintiffs' disqualification from the food stamp program was based (See 22a). Plaintiffs brought this action to review the agency's determination, and the worksheets were obviously relevant to the district court's assessment of whether or not the agency's action was supportable.

Appellants also object to the admission in evidence of defendant's exhibit A (31a), a warning letter, apparently on the ground that it was written one year before the violation occurred. Judge Metzner made it clear, however, that he was only accepting the letter as evidence that Mr. De Martino "was put on notice of possible violations . . ." (Tr. 14). For that purpose the letter was clearly admissible.

Mr. De Martino and Schuyler Market, Inc. received the full de novo trial they were entitled to under 7 U.S.C. § 2022. In the face of repeated testimony that they had violated the food stamp program regulations, however, the district court correctly found that plaintiffs had not sustained their burden of showing the invalidity of their disqualification for those violations.

CONCLUSION

The order of the district court dismissing the complaint should be affirmed.

Respectfully submitted,

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April, 1975

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